

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELZEY FREDERICK JONES, JR.

v.

RONALD S. BURKE, JR.

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Civil No. JFM-05-2358

MEMORANDUM

Plaintiff has brought this action against Ronald Burke, Jr., a Veteran's Service Center manager, alleging that Burke improperly canceled a medical procedure for a "total joint replacement" that plaintiff was scheduled to receive. Defendant has filed a motion to substitute the United States as the defendant and to dismiss or for summary judgment. Plaintiff, who is appearing *pro se*, has opposed the motion and has filed a cross-motion for summary judgment. Defendant's motion will be treated as one to dismiss and, as such, will be granted. Plaintiff's motion for summary judgment will be denied.

As the United States Attorney for the District of Maryland has certified, Burke obviously was acting within the scope of his employment at the time he committed the alleged wrong against plaintiff.¹ Accordingly, under the Federal Tort Claims Act, the United States is the proper defendant. *See* 28 U.S.C. §§2679(d)(1), (d)(2), and (d)(4); *Maron v. United States*, 126 F.3d 317, 321-22 (4th Cir. 1997).

Under the Federal Tort Claims Act, a plaintiff must first file an administrative claim with the appropriate federal agency. *See* 28 U.S.C. §2675(a); *see also* 28 U.S.C. §2401(b). Here, the

¹The United States asserts that Burke did not, in fact, cancel the medical procedure for which plaintiff was scheduled. I am not deciding the present motion on that ground, however, because resolution of it might require discovery.

record is undisputed that plaintiff filed no administrative claim with the Department of Veterans Affairs, the federal agency with which plaintiff should have filed an administrative claim. Accordingly, this action is barred.

A separate order effecting the rulings made in this memorandum is being entered herewith.

Date: June 21, 2006

/s/
J. Frederick Motz
United States District Judge

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ORDER

For the reasons stated in the accompanying memorandum, it is, this 21st day of June
2006

ORDERED

1. Defendant's motion to substitute the United States of America as a defendant (No. 16) is granted;
2. Defendant's motion to dismiss or for summary judgment (No. 16) is treated as one to dismiss and, as such, is granted;
3. Plaintiff's motion for summary judgment (No. 21) is denied; and
4. This action is dismissed.

/s/

J. Frederick Motz
United States District Judge